

## SAYING SORRY TO INDIA: REPARATIONS OR ATONEMENT?

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The policy of colonialism pursued by the imperial powers of the West destroyed nations and bankrupted civilizations. In their pursuit for wealth and power, the most inhumane acts and atrocities were committed by the colonialists. British rule in India is a stark example of the destructive impact of colonial greed. India was a thriving economy prior to its colonization by Britain, contributing 27% of global GDP in 1700. Post two centuries of exploitation by the British, India's contribution to the global economy drastically reduced to 3%.<sup>2</sup> India was a great exporter of finished cloth, but with the advent of the British, its textile industry was crushed and it became an importer; India's share in the global textile trade went from 25 percent to less than 2 percent.<sup>3</sup>

It is estimated that 35 million Indians died of starvation in British-created and mismanaged famines.<sup>4</sup> The most famous example was, of course, the great Bengal famine during the Second World War when 4 million people died because Winston Churchill deliberately, as a matter of written policy, proceeded to divert essential supplies from civilians in Bengal to Europe as reserve stockpiles to use in the event of a possible future invasion of Greece and Yugoslavia.<sup>5</sup> In the Orissa famine, over a million and a half people starved to death as the British exported 200 million pounds of rice to Britain.<sup>6</sup> William Digby pointed out that in the entire 107 years from 1793 to 1900, only an estimated 5 million people had died in all the wars around the world combined, whereas in just ten years, 1891–1900, 19 million had died in India in famines alone.<sup>7</sup>

In World War I, one-sixth of all the British forces that fought in the war were Indian. 54,000 of them lost their lives in that war, 65,000 were injured, and another 4,000 remained missing or were imprisoned. Indian taxpayers had to cough up 100 million pounds in that time's money. India supplied 17 million rounds of ammunition, 600,000 rifles and machine guns, 42 million garments were stitched and sent out of India, and 1.3 million Indian personnel served in this war. India had to supply 173,000 animals, 370 million tons of supplies, and in the end the total value of everything that was taken out of India amounted in today's money to 8 billion pounds sterling.<sup>8</sup> During the same period, India was suffering from recession, rising poverty and hunger. In addition, 2.5 million Indians fought in World War II.

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<sup>2</sup> SHASHI THAROOR, *AN ERA OF DARKNESS* 4 (ALEPH BOOK COMPANY, 2016).

<sup>3</sup> *Id.* at 8.

<sup>4</sup> *Id.* at 177.

<sup>5</sup> MADHUSREE MUKERJEE, *CHURCHILL'S SECRET WAR: THE BRITISH EMPIRE AND THE RAVAGING OF INDIA DURING WORLD WAR II* 216 (Basic Books, 2010).

<sup>6</sup> THAROOR, *supra* note 2, at 179.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 87.

Britain's total war debt to India at the time of Independence was a whopping 3 billion pounds.<sup>9</sup>

The trauma created by colonialists in Africa, especially through the transatlantic slave trade, is another illustration of the destructive impact of colonialism. Therefore, it is only natural that the former colonies, such as the Caribbean States in exercise of their sovereign powers, have called for reparations for the crimes committed against them.<sup>10</sup> Ironically, when slavery was abolished, the only compensation paid was to slave-owners for the “loss” of their “property,” rather than to the slaves themselves.

The concept of reparations gained relevance post World War II, especially after Germany agreed to provide reparations to the victims of the Holocaust. Reparations is an act of atonement for the atrocities committed, founded on moral as well as legal principles. The obligation to provide reparations arises when a violation of international law takes place and it continues till a substantial step is taken to atone for the violation. It is not an act of charity, rather a principle founded in international customary law, which was eventually codified in Article 75 of the Rome Statute. As early as in 1928, the Permanent Court of International Justice in the landmark *The Factory at Chorzów* case, held that “reparation must, as far as possible, wipe out all consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed.”<sup>11</sup> The Permanent Court held that the obligation to provide reparations for an illegal act is a “general principle of international law.”<sup>12</sup> Principle 8 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1989, passed by the UN General Assembly, states that offenders should make fair restitution to their victims.<sup>13</sup> It may be argued that the principle of reparations has its roots in the common law principles of restitution and unjust enrichment, even though in essence, reparations goes far beyond mere financial payments. Reparations, in its truest sense, involves the elimination of structures created by the colonial atrocities, as well as the acceptance of the moral responsibility for the crimes committed.

The legal basis of reparations has been reinforced through certain judicial proceedings in the recent past. In 1947, the Dutch massacred the majority of male members in Rawagede, Indonesia during the Indonesian War for Independence. In response to a case initiated by the family members of the victims, The Hague Court of First Instance held that the Government of Netherlands was responsible for the crime and ordered the Government to provide

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<sup>9</sup> *Id.* at 29.

<sup>10</sup> Samiha Shafy, *Caribbean States Call for Slavery Reparations*, Spiegel Online (March 21, 2014), <http://www.spiegel.de/international/world/caribbean-states-want-reparations-for-western-europe-slave-trade-a-960109.html> (last visited April 2, 2018).

<sup>11</sup> *Factory at Chorzów* (Germany v. Poland), P.C.I.J. Series A. No. 17, at 47 (1928).

<sup>12</sup> *Id.*

<sup>13</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. 40/34, 29 November 1985, A/CONF.121/22/Rev.1 (1985 Basic Principles of Justice).

reparations to the Indonesian victims.<sup>14</sup> The Court dismissed the argument that the cause of action was barred by the statute of limitations, especially due to the gravity of the atrocities committed as well as due to the admission of the crime by the State. Similarly, in *Ndiku Mutua & Ors v. The Foreign and Commonwealth Office*,<sup>15</sup> a case seeking reparations was brought against the Government of UK for the British atrocities during the Mau Mau Uprising in the 1950s in Kenya. Justice McCombe ruled that there was ample evidence of systematic torture by the British forces, and therefore a substantial case for reparations. Similar to *Rawagede* case, the judge used his discretion to waive the limitation period, stating that the victims would not have been able to bring the case earlier owing to lack of prior historical scholarship.<sup>16</sup> The British Government eventually agreed to pay £19.9 million in damages.<sup>17</sup>

Many of the British crimes committed in India, from the Jallianwala Bagh massacre in which over 1,000 innocent people, including women and children, were shot dead by the forces of Col. Reginald Dyer, to the man-made Bengal famine of 1943, can be categorized as crimes against humanity, for which reparations are due. One of the probable arguments against the legal basis to seek reparations for colonial crimes is that the law cannot be applied ex-post facto to criminalize acts which were legal under the colonial regime. It is similar to the arguments of the Nazis during the Nuremburg trials who argued that the Holocaust at the time of its commission, under German law, was legal. However, the Nuremburg Tribunal upheld the position that the maxim *nullum crimen sine lege* allows for punishment of actions, even though they were not necessarily strictly prohibited under law at the time of commission, if it is shown that it would be unjust if those who committed such actions are allowed to go unscathed.<sup>18</sup> Even if the crimes were not perpetrated by the present Government of the UK, the liabilities of the British Raj very much rests with the UK, in line with the judgment of the ICJ in *Bosnia v. Yugoslavia*<sup>19</sup> wherein it was held that the democratic governments are responsible for the crimes committed by its undemocratic predecessors.

The very essence of a colonial economy rests on the exploitation of the colony, which is enforced through a greater or lesser degree of brutality, depending on the coloniser. Therefore, all colonial powers are *ipso facto* liable to provide reparations to the exploited former colonies. However, as a matter of practice to ensure that the ends of justice are met, a

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<sup>14</sup> *Stichting Komitee Utang Kehormatan Belanda v. Netherlands*, trial judgment, LJN: BS8793, 14 September 2011.

<sup>15</sup> *Mutua and Others v. The Foreign and Commonwealth Office* [2011] EWHC 1913 (QB).

<sup>16</sup> Daniel Leader, *The Mau Mau Litigation – Justice at Last*, Oxford Human Rights Hub (Nov. 3, 2015), <http://ohrh.law.ox.ac.uk/the-mau-mau-litigation-justice-at-last/> (last visited April 2, 2018).

<sup>17</sup> *Id.*

<sup>18</sup> ANTONIO CASSESE & PAOLA GAETA, *CASSESE'S INTERNATIONAL CRIMINAL LAW* 89 (4<sup>th</sup> ed. 2013).

<sup>19</sup> Application for revision of the judgment of 11 July 1996 in the case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*).

strict positivist application of law should be avoided while adjudicating matters of mass crimes. Legal regimes which sanctioned such crimes lack the inner morality of law; as the maxim *lex iniusta non-est lex* states, an unjust law is no law at all. The absence of an express prohibition of certain acts also should not be mounted as a defence, as human actions are to be measured by certain universal standards expected of a civilized society, and not merely the text of statute books.

The resistance to the concept of reparations on the ground that it would open a Pandora's box is belied by the experience in history. The claim for reparations is not a new concept. Germany provided reparations to the victims of the Nazi regime.<sup>20</sup> Reparations were also provided to Japanese Americans who were wrongfully arrested and detained during World War II by the US forces post the passage of the Civil Liberties Act of 1988, and Australia provided reparations to the aborigines for appropriating their land during the 18<sup>th</sup> century.<sup>21</sup> Italy and Libya also signed an agreement whereby Italy agreed to provide reparations to the tune of \$5 billion for the crimes committed during the colonial Italian rule in Libya.<sup>22</sup> By practice, the most successful claims of reparations are ones enforced through mutual agreements, rather than traversing the long judicial line to seek justice. Countries which exploited their former colonies owe a moral responsibility to take the initiative to frame such agreements rather than be forced to do so through the demands of the former or through the writ of a Court.

There is, nonetheless, a different aspect to the question – the practical one. While I am convinced about the wrongs inflicted on colonial subjects by the British empire, I have argued that India should be content with a symbolic reparation of one pound a year, payable for 200 years to atone for 200 years of imperial rule. I have suggested that atonement was the point, rather than cash. Indeed, the attempt by one Indian commentator, Minhaz Merchant, to compute what a fair sum of reparations would amount to, came up with a figure so astronomical – three trillion pounds in today's money<sup>23</sup>— that no one could ever reasonably be expected to pay it. (The sum would be larger than Britain's entire GDP.) I have gone on to say that atonement should take three forms: teaching unvarnished British colonial history in UK schools, setting up with British tax money a museum to colonialism in the Imperial capital, and above all, expressing an apology to the victims of colonialism. (A suitable opportunity looms on the centenary of the Amritsar Massacre on April 13, 2019).

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<sup>20</sup> Robert Westley, Many Billions Gone—Is It Time to Reconsider the Case for Black Reparations? 40 B.C. THIRD WORLD L. REV. 429, 453–4 (1998).

<sup>21</sup> Lori Robinson, *Righting a Wrong: Among Black Americans, The Debate is Escalating over Whether an Apology for Slavery is Enough*, SEATTLE POST-INTELLIGENCER, June 29, 1997, at E1.

<sup>22</sup> Claudia Gazzini, *Assessing Italy's Grande Gesto to Libya*, Middle East Report Online (March 16, 2009), <http://www.merip.org/mero/mero031609>.

<sup>23</sup> Minhaz Merchant, *Why Shashi Tharoor is Right on Britain's Colonial Debt to India*, Daily O (Oct. 28, 2017), <https://www.dailyo.in/variety/shashi-tharoor-british-imperialism-british-rule-railways-history-debt-gdp/story/1/20283.html> (last visited July 5, 2017).

Reparations are not a substitute for the trauma and the horrors caused by colonialism, because the agony suffered can never truly be removed through damages, nor can the value of the human lives lost because of colonial indifference or brutality be accurately computed. It is rather a moral obligation which the West owes to its colonies as the wealth and the economic success of these former colonial powers were built on the broken backs of their colonies. The payment of reparations offers a semblance of justice as well as expiates a legal and moral obligation which cannot and should not be ignored.